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No. 76-408

In the Supreme Court of the United States

OCTOBER TERM, 1976

RUBEN MORALES ROBLES AND ROBERT DALE HART,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (Pet. App. D) is not yet reported. The earlier panel opinion (Pet. App. A) is also not reported.

JURISDICTION

The judgment of the court of appeals *en banc* was entered on July 22, 1976. A petition for rehearing *en banc* was denied on August 19, 1976 (Pet. App. G). The petition for a writ of certiorari was not filed until September 20, 1976, and is accordingly out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the requirements of due process are satisfied by the government's making reasonable efforts to produce an informant at trial, and whether such efforts were made in this case.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioners were convicted of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Each was sentenced to five years' imprisonment, a $3,000 fine and five years' special parole.

A panel of the Ninth Circuit reversed both convictions. It ruled that the district court had erred in not allowing petitioner Robles to assert an entrapment defense unless he first took the stand and admitted doing the acts charged, which Robles refused to do (Pet. App. iii-iv); it further ruled that both petitioners' convictions must be reversed because the prosecution is to be deemed a "guarantor" of the appearance at trial of an informant in this case, who did not in fact appear (*id.* at ix-xi).

The court of appeals *en banc* reversed the latter ruling, holding that the prosecution is not a guarantor of the appearance of informants, that the test was whether the government had used reasonable efforts to secure the appearance of an informant subject to court order to appear, and that on the particular facts of this case the government had satisfied that test (Pet. App. xxxvi-l). The *en banc* court agreed with the panel, however, that petitioner Robles should have been allowed to raise entrapment as a defense notwithstanding his refusal to take the stand and admit the elements of the crime (*id.* at li-lii). Accordingly, petitioner Hart's conviction was affirmed and petitioner Robles' conviction was reversed and remanded for further proceedings (*id.* at liii).

1. In April 1974 government informants Murrieta and Borjorquez introduced Agent Lugo of the Drug Enforcement Administration, who was posing as a prospective cocaine purchaser, to petitioner Hart (R. Tr. 5-8; H. Tr. 51-54).[1] The informants had previously obtained a sample quantity of cocaine from one of petitioners' associates and in turn had given the sample to DEA agents for testing (R. Tr. 43-44). Murrieta thereafter telephoned petitioner Hart, who told him to come to his house to complete the sale (R. Tr. 27; H. Tr. 51-52). Petitioner Robles was at petitioner Hart's house during the transaction (R. Tr. 7; H. Tr. 53). A price was negotiated, and Robles contacted petitioners' supplier, who delivered the cocaine shortly thereafter. Petitioner Robles left the house momentarily to accept delivery (R. Tr. 9-17; H. Tr. 57-65). When he returned the cocaine was weighed and handed to Agent Lugo. Petitioners were then arrested (R. Tr. 17-22; H. Tr. 68-72).

2. On June 12, 1974, petitioner Hart moved that the government disclose the identity of and produce any informants involved in the events covered by the indictment. Following a hearing on June 17, 1974, the district court granted the motion and scheduled the trial for August 13, 1974. The government immediately gave petitioners' counsel the names of both Murrieta and Borjorquez.

On July 25, 1974, Borjorquez appeared in Tucson and was interviewed at length by petitioners' counsel (aided by a court interpreter). Borjorquez stated that both he

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[1] "R. Tr." and "H. Tr." refer to the respective one-volume transcripts of the trials of petitioners Robles and Hart. "M. Tr." refers to the one-volume transcript of the August 12, 1974, hearing on petitioners' motion for a continuance. We are lodging copies of these transcripts with the Clerk of this Court.

and Murrieta were residents of Mexico; that Murrieta operated a grocery store at a specific address, which he furnished counsel; and that he had asked Murrieta to come to Tucson but that Murrieta could not because he was sick (Pet. App. xxxvii-xxxviii).

Petitioners then moved for a continuance based on Murrieta's failure to appear for an interview. At a hearing on the motion held on Monday, August 12, 1974, Agent Lugo testified that on at least a dozen occasions in the preceding month he had told Murrieta and Borjorquez that they would have to be present for the trial (M. Tr. 19-22; Pet. App. xxxviii-xxxix). In none of these conversations did either informant indicate that he would not be present. Indeed, on the day before the hearing both informants had assured him that they would come to Tucson for a pretrial interview and for the trial (M. Tr. 23-34). The district court denied petitioners' motion with leave to renew it the next day if Murrieta had still not appeared (M. Tr. 37-38; Pet. App. xxxix).

Murrieta did not arrive on Tuesday and another hearing was held on that day. Agent Lugo testified that Borjorquez had telephoned him shortly after the previous day's hearing and that during the conversation he had strongly admonished Borjorquez to bring Murrieta to Tucson at once. He also testified that he told Borjorquez to call him from the border and that he would drive them to Tucson (Pet. App. iv1). The informants had not, however, telephoned or otherwise contacted Agent Lugo (M. Tr. 35-36). The district court denied the motion again. It ruled (Pet. App. 1iv n. 2):

> It appears to me that the Government has met the burden that they must bear. They've done everything required to do lawfully, legally to get these witnesses here.

3. In affirming, the majority of the *en banc* court of appeals placed heavy emphasis on the fact that, until his nonappearance in the present case, Murrieta

> had always been cooperative. He had promised to testify in court in May [1974] in [another] narcotics case and had appeared and testified as he had promised. He had not at that time refused to cooperate in any respect so far as the record shows. Neither had he failed to keep any commitment to testify. [Pet. App. iv1ii.]

The court of appeals also noted that there was no evidence whatever that the government had "participated" in Murrieta's absence (Pet. App. 1vi n. 7); that the record was silent regarding the reason for his absence (*id.* at ivliv); and that at the time in question the government had had "no reason to suspect that [Murrieta's] future performance would be any less than the 100 percent performance of the past" (*ibid.*).

ARGUMENT

The *en banc* court of appeals correctly ruled that the government is not a guarantor of an informant's presence at trial. This proposition is uniformly accepted in the courts of appeals. See *United States* v. *Williams*, 496 F. 2d 378, 382 (C.A. 1); *United States* v. *Super*, 492 F. 2d 319, 321 (C.A. 2), certiorari denied *sub nom. Burns* v. *United States*, 419 U.S. 876; *United States* v. *Jones*, 492 F. 2d 239, 242 (C.A. 3); *United States* v. *White*, 344 F. 2d 92 (C.A. 4); *United States* v. *Tatum*, 496 F. 2d 1282, 1284 (C.A. 5); *United States* v. *Craig*, 477 F. 2d 129 (C.A. 6); *United States* v. *Cansler*, 419 F. 2d 952, 954 (C.A. 7), certiorari denied, 397 U.S. 1029; *United States* v. *Pollard*, 483 F. 2d 929, 931 (C.A. 8), certiorari denied, 414 U.S. 1137; *United States* v. *Hayes*, 477 F. 2d 868, 871 (C.A. 10). Indeed, no court of appeals applies a test any more

stringent than that adopted by the Ninth Circuit here—that the government is required to make a "reasonable effort" to produce a government informant whose presence has been properly requested by the defendant (Pet. App. xxxvi). After a careful review of the record, the court of appeals concluded, as had the district court, that in this case the government had satisfied that test. This factual determination does not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.

Furthermore, the court's conclusion was correct. As it noted (Pet. App. iv1iv), Murrieta had honored previous government instructions to appear and had given no indication that this time would be any different. Agent Lugo repeatedly urged the informants to make themselves available for trial and offered to assist them in doing so. In these circumstances, as the district court determined (Pet. App. ivlv), the government had done everything reasonably necessary and proper that could be required legally to get these witnesses to trial.[2]

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[2]Petitioners' claim that a conflict exists among the circuits regarding the application of the "reasonable efforts" standards (Pet. 19-25) is unsupportable. In *United States* v. *Williams,* 496 F. 2d 378 (C.A. 1), cited by petitioners (Pet. 23), the court said, in language that is fully consistent with the decision in this case, that "should an informer disappear or become unavailable to the defense, we would compel the government, upon timely demand, either to locate him or make an affirmative showing satisfactory to the court why it could not reasonably be expected to do so and of its diligence generally as regards the disappearance" (496 F. 2d at 382).

Nor does *United States* v. *Jones,* 492 F. 2d 239 (C.A. 3), also cited by petitioners (Pet. 20), conflict with the instant decision. There the government advised the defense of the existence of an informant but did not disclose his identity. Not until the day of trial did the government tell the defense that the informant would not be called as a witness, and only at that point did the government make any effort to locate the informant. Moreover, during trial the government gave two different addresses for the informant's place of residence. The court concluded that the government had failed to undertake a serious search for the informant

Petitioner is not aided by *United States* v. *Mendez-Rodriguez,* 450 F. 2d 1 (C.A. 9). There the court ruled that due process was denied when the government returned to Mexico aliens who were potential witnesses but who were unavailable to the defendant by virtue of the government's conduct. In contrast, nothing in the record in this case suggests that the government participated in any way in Murrieta's failure to appear. See Pet. App. 1vi n. 7.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys.

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and that that failure, coupled with an "accumulation of mishaps[,] so hampered the defense that fairness requires a new trial" (492 F. 2d at 242). Here, however, the government advised the defense long before trial of the identity and location of the informants, and it did everything reasonably within its power to secure their presence prior to trial.

[3]Petitioners also claim (Pet. 26-29) that they were denied their right to appellate review because the court of appeals applied the clearly erroneous standard in reviewing the district court's finding that the government had made reasonable efforts to produce Murrieta. There is no occasion for this Court to review this contention, for even under the most searching standard of appellate review the result here would remain unchanged, given the history of Murrieta's cooperation, the government's nonparticipation in his failure to appear, and Agent Lugo's repeated attempts to secure Murrieta's presence.

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